THE MINISTER FOR HUMAN RESOURCES

v.

THONG CHIN YOONG & ANOTHER APPEAL

FEDERAL COURT, KUALA LUMPUR
WAN ADNAN ISMAIL CJ (MALAYA)
SITI NORMA YAAKOB FCJ
HAIDAR MOHD NOOR FCJ
[CIVIL APPEAL NOS: 01-4-2000(W) & 02-17-2000(W)]
28 JULY 2001

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Issue for determination - Whether within ambit of s. 96 Courts of Judicature Act 1967*

LABOUR LAW: *Employment - Suspension - Whether employer has a right to suspend employee for a prolonged period of time pending investigations of allegations of misconduct - Whether issue to be determined by Industrial Court - Whether Minister for Human Resources erred in his discretion by declining to refer case to Industrial Court - Industrial Relations Act 1967, s. 20(3)*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Discretion - Whether Minister for Human Resources erred in his discretion by declining to refer case to Industrial Court - Industrial Relations Act 1967, s. 20(3)*

The respondent was the Hotel & Resort Development Manager of Berjaya Industrial Berhad ('the Company'). He was suspended from work by the Company pending investigations of allegations of misconduct. The respondent being dissatisfied with the prolonged investigations considered himself constructively dismissed. The matter was eventually referred to the Minister for Human Resources ('the Minister') and the Minister, in the exercise of his discretion under s. 20(3) of the Industrial Relations Act 1967 ('the Act'), declined to refer the case to the Industrial Court for an award. The respondent then applied to the High Court for an order of *certiorari* and *mandamus* against the Minister's decision. The respondent was successful before the High Court as well as before the Court of Appeal. In this instance, the Minister and the Company, appealed before the Federal Court.

The respondent raised a preliminary objection on whether the question framed by the Federal Court for its determination met with the requirements of s. 96(a) of the Courts of Judicature Act 1964. It was argued that the question was on the suspension issue whereas the High Court and the Court of Appeal decided only on whether the Minister had exercised his discretion correctly under s. 20(3) of the Act. The merits of the respondent's case were not considered at all.

Held:
Per Haidar Mohd Noor FCJ

[1] The Minister in determining whether the respondent was constructively dismissed should have considered the suspension issue, *ie*, the effect of the contract of employment of the respondent with the Company wherein there was no express term for the Company to suspend the respondent indefinitely for investigations even though there were no loss of emoluments, perks, etc. That might lead to the issue of whether there was a breach of the contract of employment by the Company, thereby entitling the respondent to constructive dismissal. The High Court and the Court of Appeal did not consider the issue of suspension except to state that it might be relevant for the purpose of determining whether the respondent was entitled to declare himself constructively dismissed.

[2] The question as framed seemed to indicate that it was a point of law in which case the proper forum to consider it would be the Industrial Court and eventually if need be the various levels of the courts in the judicial system. Hence, the Minister erred in the exercise of his discretion under s. 20(3) of the Act as held by the High Court and upheld by the Court of Appeal. It followed therefore, that the court was asked to consider an issue which was not determined by the High Court and the Court of Appeal and the proper order to make would be to decline to answer the question. In the circumstances, s. 96(a) of the Courts of Judicature Act 1964 was inapplicable.

[Appeals dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden adalah pengurus pembangunan Hotel dan Resort di Berjaya Industrial Berhad ('syarikat tersebut'). Beliau digantung dari kerja oleh syarikat tersebut sementara menunggu penyiasatan mengenai tuduhan kelakuan buruk. Responden tidak puas hati dengan penyiasatan yang berpanjangan dan menganggapnya dipecat secara konstruktif. Perkara ini

akhirnya dirujukkan kepada Menteri Sumber Manusia ('Menteri tersebut') dan Menteri tersebut dalam penggunaan budi bicaranya di bawah s. 20(3) Akta Perhubungan Perusahaan 1967 ('Akta tersebut'), enggan merujukkan kes tersebut kepada Mahkamah Perusahaan untuk mengaward. Responden kemudian memohon kepada Mahkamah Tinggi supaya diberikan suatu perintah *certiorari* dan *mandamus* terhadap keputusan Menteri tersebut. Responden berjaya di hadapan Mahkamah Tinggi dan juga di hadapan Mahkamah Rayuan. Menteri dan syarikat tersebut, kini merayu di hadapan Mahkamah Persekutuan.

Responden tersebut menimbulkan bantahan permulaan samada soalan yang ditimbulkan oleh Mahkamah Persekutuan untuk keputusan memenuhi keperluan s. 96(a) Akta Mahkamah Kehakiman 1964. Responden berhujah bahawa persoalan berkaitan dengan isu penggantungan sedangkan Mahkamah Tinggi dan Mahkamah Rayuan hanya memutuskan samada Menteri tersebut telah menggunakan budi bicaranya dengan sempurna di bawah s. 20(3) Akta tersebut.

Diputuskan:
Oleh Haidar Mohd Noor HMP

[1] Menteri tersebut bila memutuskan samada responden tersebut telah dipecat secara konstruktif harus menimbangkan isu penggantungan, iaitu kesan kontrak pekerjaan responden dengan syarikat tersebut di mana tidak ada terma nyata untuk syarikat tersebut menggantung responden secara tidak tetap dan tidak pasti sementara penyiasatan walaupun tidak ada kerugian pendapatan, keuntungan, etc. Itu akan menimbulkan isu samada pelanggaran kontrak pekerjaan oleh syarikat tersebut menyebabkan responden diberi hak untuk pecatan konstruktif. Mahkamah Tinggi dan Mahkamah Rayuan tidak mempertimbangkan isu penggantungan kecuali untuk menyatakan bahawa ianya relevan untuk memutuskan samada responden berhak untuk mengumumkan diri dipecat secara konstruktif.

[2] Persoalan sepertimana yang dirangka nampaknya menunjukkan bahawa ianya adalah suatu perkara undang-undang dan majlis perbincangan yang tepat untuk memutuskannya adalah Mahkamah Perusahaan dan akhirnya jika perlu, peringkat mahkamah-mahkamah di dalam sistem kehakiman. Justeru, Menteri tersebut tersilap dalam penggunaan budi bicaranya di bawah s. 20(3) Akta tersebut sepertimana diputuskan oleh Mahkamah Tinggi dan disokong oleh Mahkmah Rayuan. Justeru, mahkamah kini diminta mempertimbangkan suatu isu yang tidak diputuskan oleh Mahkamah Tinggi dan Mahkamah Rayuan dan perintah

yang tepat adalah untuk tidak menjawab soalan tersebut. Memandangkan keadaannya, s. 96(a) Akta Mahkamah Kehakiman 1964 tidak dapat dipraktikkan.

[Rayuan-rayuan ditolak.]

Case(s) referred to:

Capital Insurance Bhd v. Aishah Abdul Manap & Anor [2000] 4 CLJ 1 ***(refd)***

Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors [1981] 1 MLJ 238 ***(refd)***

Minister of Labour, Malaysia v. Chan Meng Yuen [1992] 2 MLJ 337 ***(refd)***

Minister of Labour, Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 ***(refd)***

Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 96(a)

Industrial Relations Act 1967, s. 20(1), (2), (3)

Rules of the Federal Court 1995, r. 108(1)(c)

For the appellants - Asmabi Mohamad SFC, VK Lingam (S Rutheran, S Ashokvijay & KV Kanahalashimi); M/s Siva & Partners

For the respondent - B Lobo (LG Seah); M/s Lobo & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Haidar Mohd Noor FCJ:

There are two appeals, civil appeal 01-4-2000(W) is by the Minister for Human Resources ("Minister") and civil appeal 02-17-2000(W) is by Berjaya Industrial Berhad ("company"). Thong Chin Yoong ("claimant") is the respondent in respect of both appeals.

As agreed by the parties, we directed the two appeals be heard together as in the Court of Appeal as they emanate from an order of the High Court dated 25 June 1996 and which order was affirmed by the Court of Appeal on 14 April 1999. The High Court by its order of 25 June 1996 issued an order of *certiorari* to quash the decision of the Minister made on 21 January 1995 under s. 20(3) of the Industrial Relations Act 1967 ("Act") declining to refer the representations of the claimant to the Industrial Court for an award as well as an order of *mandamus* directing the Minister to refer the representations to the Industrial Court.

In granting leave to appeal on 28 August 2000 the Federal Court, pursuant to r. 108(1)(c) the Rules of the Federal Court 1995, framed the following question for its determination:

> Whether the employer can suspend an employee without loss of pay, benefits and perks pending the conclusion of the investigations and inquiries into his conduct notwithstanding that this is not stated in the terms of employment.

Mr. Lobo, counsel for the claimant gave notice that he intended to raise a preliminary objection, that is, the question as framed does not come within the meaning of s. 96(a) of the Courts of Judicature Act 1964 and hence the appeal should be dismissed forthwith.

We indicated to the counsel for the parties to submit on the preliminary objection and the merits of the appeal at one go.

The facts of the case are essentially not disputed and can be shortly stated as follows.

The claimant joined the company on 16 August 1988 as a Hotel & Resort Development Manager. On 1 January 1994, the claimant's position was redesignated as Vice-President & General Manager (Hotel & Resorts) on A3 Grade. The terms and conditions of service remained unchanged.

On 30 March 1994 the company caused a notice to be issued to the claimant suspending him from his work with immediate effect until further notice in writing by the company. The suspension did not involve in the claimant's loss of emoluments, benefits and other perks until the investigation was completed.

On 21 April 1994 the claimant wrote to the company to inquire his position in the company since the date of his suspension. The claimant asked the company to inform him regarding his position before 28 April 1994 failing which he would have to reconsider his stand in the matter.

On 25 April 1994 the company responded by letter informing the claimant that the allegations of misconduct against him were still in progress and his suspension from work with full pay would continue until the investigation was completed. The company undertook to inform the claimant of the outcome of the investigation.

By letter dated 26 April 1994 to the company the claimant in referring to his letter dated 21 April 1994 and the company's reply dated 25 April 1994 alleged "It is clear to me **now** that the company did not have any material justifying my sudden suspension by its letter of 30 March 1994. Your

prolonged "investigations" confirms this fact". The claimant at the same time gave an ultimatum to the company to lift the suspension and revert him to his job in the company on or before 4 May 1994 failing which he would have no alternative but to consider himself dismissed by the company with effect from that date.

The company responded *vide* letter dated 3 May 1994 saying that the allegation of the claimant was totally misconceived and unfounded. The company further reiterated that it had received reports of alleged acts of gross misconduct committed by the claimant. It was further stated that the nature, gravity and the seriousness of the allegations were such as to warrant indepth and prolonged investigation by the company. As the investigation by the company was still in progress, the company could not accept the claimant's ultimatum to lift the suspension on or before 4 May 1994. The company undertook to notify the claimant of the outcome of the investigation as soon as the investigation is completed.

The claimant, being not satisfied with the stand taken by the company, *vide* letter dated 3 May 1994 to the company said that he had no alternative but to consider himself dismissed with effect from 4 May 1994. He notified the company that he would be seeking legal remedies opened to him.

The claimant subsequently wrote a letter dated 10 May 1994 to the Director General of Industrial Relations seeking reinstatement into his former employment under s. 20(1) of the Act. In his letter the claimant claimed that he was dismissed without just cause or excuse with effect from 4 May 1994.

Apparently, the Director General of Industrial Relations was satisfied that there was no likelihood of the representations being settled and he accordingly notified the Minister pursuant to s. 20(2) of the Act.

The Minister, in exercise of his discretion under s. 20(3) of the Act, thought that the claimant's representations were not fit to be referred to the Industrial Court for an award. The claimant was informed of the Minister's decision by letter dated 21 January 1995.

The claimant then moved the High Court at Kuala Lumpur for an order of *certiorari* and *mandamus* against the Minister's decision. The claimant was successful before the High Court as well as before the Court of Appeal.

Preliminary Objection

The preliminary objection of the claimant is anchored on whether the question framed by the Federal Court for its determination meets with the requirements of s. 96(a) of the Courts of Judicature Act 1964 when granting leave to appeal. Section 96(a) reads:

> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with leave of the Federal Court:
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction "involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or
>
> (b) ...

According to counsel for the claimant, the High Court decided only one issue, that is, the Minister erred in the exercise of his discretion under s. 20(3) of the Act in declining to refer the representations of the claimant to the Industrial Court. Consequently an order for *certiorari* and an order for *mandamus* were issued by the High Court. The Court of Appeal upheld the decision of the High Court.

We agree that the issue is only on the exercise of the discretionary power by the Minister under s. 20(3) of the Act. In other words, the High Court and the Court of Appeal did not consider the merits of the claimant's representations at all. This is what the Court of Appeal said at p. 5 of its judgment (p. 17 of the Appeal Record vol. 1):

> First and foremost we should make it clear that we are here not hearing this appeal on its merits since the matter was never decided by the Industrial Court. Therefore, whether the suspension was justified or not or whether such a suspension amounted to constructive dismissal or not is not for us to decide in this appeal. What we have to decide is whether the Minister was justified in refusing to refer the matter to the Industrial Court.

It would seem clear to us the issue really is centred on whether on the materials before him, the Minister was right in exercising his discretion under s. 20(3) of the Act by declining to refer the representations of the claimant to the Industrial Court on the ground that he thought it was not a fit case.

The words "the Minister may, if he thinks fit, refer the representations to the court" had been judicially considered by the apex court of this country then, that is, the Supreme Court in *Minister of Labour, Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103 where at p. 1104 Hashim Yeop A. Sani CJ (Malaya) said:

> There is no question that the power of the Minister under section 20(3) of the Act is wide and the language used by the legislature would seem to confer on the Minister a wide discretion whether to refer or not to refer a dispute to the Industrial Court depending on the facts of each case provided of course he has acted *bona fide*, that is without an improper motive, and he has not taken into account extraneous or irrelevant matters. He has an unfettered discretion but should not be exercised so as to frustrate the object of the statute.

In this appeal, at the leave application stage, the company did not rely on the issue of the Minister's power, which was the core issue but instead proceeded on the issue of suspension. This is borne out by the grounds, relied on by the company's officer Soon Kean Tiong's affidavit at para. 15. Further the application for leave to appeal is against the decision of the Court of Appeal but then the decision of the Court of Appeal as stated earlier is centred on the Minister's exercise of his discretionary power in declining to refer the claimant's representations to the Industrial Court.

The Minister did not give any reasons for declining to exercise his discretion under s. 20(3) of the Act for which he was entitled to. (See *Minister of Labour, Malaysia v. Chan Meng Yuen* [1992] 2 MLJ 337). However, according to the Minister, he relied on the information provided by the Director General pursuant to s. 20(2) of the Act after a settlement could not be reached. One of the material that the Minister must have considered in determining whether the claimant was dismissed without just cause or excuse or as the claimant put it, he was constructively dismissed, would be on the suspension issue. In other words, what is the effect of the contract of employment of the claimant with the company wherein there is no express term for the company to suspend the claimant indefinitely for investigation even though there was no loss of emoluments, perks etc. It may well lead to the issue of whether there has been a breach of the contract of employment by the company and thereby entitling the claimant to treat the repudiatory act of the company as affecting the foundation of the contract and therefore consider himself as constructively dismissed. (*Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 CLJ 45).

The High Court and the Court of Appeal did not consider the issue of suspension except to say that it may be relevant for the purpose of determining whether the claimant was entitled to declare that he was constructively dismissed. This issue involved mixed questions of law and fact for the Industrial Court. (*Fung Keong Rubber Manufacturing (M) Sdn. Bhd. v. Lee Eng KIat & Ors.* [1981] 1 MLJ 238). Further, the question as framed seems to indicate that it is a point of law in which case then the proper forum to consider would be the Industrial Court and eventually if need be the various level of the courts in our judicial system. Hence the Minister erred in the exercise of his discretion under s. 20(3) of the Act as held by the High Court and upheld by the Court of Appeal. It is best that we say no more on this issue.

It seems clear to us that the Federal Court was asked to consider an issue which was not determined by the High Court as well as the Court of Appeal. To that extent the proper order that we should make would be to regretably decline to answer the question. It is best that the issue of suspension be considered by the Industrial Court in determining whether the claimant was dismissed without just cause or excuse or as he put it "constructively dismissed".

In the circumstances of the case we agree with the preliminary objection of counsel for the claimant that the question framed by this court for its determination does not come within the ambit of s. 96(a) of the Courts of Judicature Act 1964. In the result we need not consider the merits as submitted by counsel for the parties and it follows that both appeals must be dismissed with costs and we so order. In our view we can make such an order without considering the merits of the appeal (*Capital Insurance Bhd. v. Aishah bte Abdul Manap & Anor* [2000] 4 CLJ 1). The deposit to the claimant towards his taxed costs.